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Supreme Court, U.S.
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NO.

in the

Supreme Court

of the

United States

OCTOBER TERM, 1989

RICHARD JOSEPH,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

I.

WHETHER THE DECISION OF THE COURT BELOW, WHICH DETERMINED THAT THE GOVERNMENT DID NOT COMMIT A DISCOVERY VIOLATION BY FAILING TO TIMELY PROVIDE DEFENSE COUNSEL WITH CRITICAL IMPEACHMENT MATERIAL INVOLVING A KEY GOVERNMENT WITNESS, AND FURTHER DETERMINED THAT THE TRIAL COURT DID NOT ERR BY PERMITTING THE GOVERNMENT TO DISCLOSE THIS IMPEACHMENT MATERIAL TO DEFENSE COUNSEL AFTER THE WITNESS HAD COMPLETED HER TESTIMONY AND THEN PERMIT THE GOVERNMENT TO ELICIT TESTIMONY IN A REHABILITATIVE FASHION DURING A SECOND DIRECT EXAMINATION OF THE WITNESS IS IN DIRECT CONFLICT WITH DECISIONS OF THIS COURT, AND WITH DECISIONS OF OTHER CIRCUIT COURTS, REFLECTING A PARTICULAR NEED FOR A UNIFORM STANDARD AND APPLICATION OF LAW.

II.

WHETHER THE DECISION OF THE COURT BELOW, WHICH DETERMINED THAT THE GOVERNMENT'S CONDUCT WAS NOT IMPROPER WHEN IT FAILED TO CORRECT THEIR KEY WITNESS' PERJURIOUS TESTIMONY, IS IN DIRECT CONFLICT WITH DECISIONS OF THIS COURT, AND WITH DECISIONS OF OTHER CIRCUIT COURTS, REFLECTING A PARTICULAR NEED FOR A UNIFORM STANDARD AND APPLICATION OF LAW.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

The Petitioner, RICHARD JOSEPH, by his undersigned counsel, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit, entered in the proceedings on March 15, 1989.

OPINION OF THE COURT BELOW

The opinion of the Court of Appeals for the Eleventh Circuit is reported at *United States v. Knight*, 867 F.2d 1285 (11th Cir. 1989).

JURISDICTION

The judgment of the Court of Appeals affirming the judgment of the United States District Court was entered on March 15, 1989. A timely petition for rehearing and suggestion of rehearing en banc was filed on March 31, 1989, and was denied on May 4, 1989. This petition is filed pursuant to Rule 20, Rules of the Supreme Court, as amended. The jurisdiction of this Court is invoked pursuant to the provisions of Title 28, United States Code, Section 1254(1).

STATEMENT OF THE CASE

The DEA began investigating Richard Joseph in late December of 1984, and their investigation centered around alleged drug activities occurring at "My Children's Place," the "Mad Dog Game Room," an apartment known as "the stash house," and a co-defendant's house, all of which were located in Miami, Florida [R.12:197-9; R.15:77; R.22:112, 158-9].

Through the use of informants, including one Tammy Dennis, DEA agents arranged numerous controlled purchases of heroin from several co-defendants.

Key government witness Tammy Dennis was recruited by Broward Sheriff's Office Detective Alvin Pollock, and was intimately involved with the government in trying to make a case against the Petitioner and his co-defendants [R.17:177-8; R.15:120-2, 136-9; R.16:36-51R.26:193]. In preparation for this trial, the government spent several days outlining Dennis' proposed testimony with her [R.16:67-90; R.17:5-11].

Dennis described during the trial the numerous "deals" that she set up in order to assist the government. In June of 1985, Dennis made a series of unrecorded telephone calls in attempts to set up a narcotics deal. In August of 1985, a transaction took place at co-defendant Barry Harris' apartment in the presence of Agent Smith [R.13:161, 194; R.21:98]. Two weeks later, another deal took place, this time between Roy Hawkins and Detective Smith, at Tammy Dennis' apartment [R.14:192-3; R.16:77, R.17:133; R.21:98-9]. It was about this time that confidential informant Paul Pollock, brother of Broward Sheriff's Office Detective Alvin Pollock, began working with the government.

On September 10, 1985, another purchase and sale of heroin was set up by Tammy Dennis at her apartment, this time involving co-defendant Tara Garrison. CI Paul Pollock telephoned Tara Garrison at her business office, and Garrison arrived at Dennis' apartment approximately one hour later. Garrison was introduced to Agent Roberts, posing as an undercover purchaser, "Joe," from Atlanta, and Garrison gave "Joe" the heroin that she had brought with her [R.12:224-5; R.13:195-8, 245-7, 251, 254-5, 263; R.15:5; R.17:114; R.18:155; R.21:100].

On September 15, 1985, Detective Wright, contacted co-defendant Henry Regan, who had been introduced to him by "Gopher." Wright arranged for the purchase of heroin from Regan, and an exchange was later made [R.17:82, 93-4, 114; R.18:63].

In October 1984, two more controlled buys were arranged by Tammy Dennis at her apartment, involving co-defendants Tara Garrison and Barry Harris. After the October 24 transaction, there was an unrecorded conversation that took place between Tara Garrison and Tammy Dennis, at which time Dennis testified that Garrison had called out to someone named "Bear" about the price, and that a black male answered, "Yes." However, this alleged conversation was not recorded, and there was no evidence introduced that the male voice in the background was Joseph's [R.15:30-1, 203]. On November 22, 1985, Dennis, after being wired with a body bug and supplied with the necessary cash, by the DEA, arranged to meet Barry Harris at My Children's Place. At My Children's Place she met with co-defendant Michael Knight, also known as "T-Berry," and Richard Joseph. The three had discussions about drugs, and this conversation was recorded. While Joseph and Dennis continued to talk, T-Berry left and returned 15 minutes later with a package of heroin for Dennis. Dennis later met with agents and turned over the package to Agent Cutcliffe [R.15:46-60; R.18:220].

In December 1985, Dennis placed several recorded telephone calls to My Children's Place, and made arrangements to meet T-Berry to purchase heroin. Dennis was again wired with a body bug, but none of the conversation taking place between she and T-Berry

were discernable from the tape, so the tape was therefore ruled inadmissible at trial. Dennis gave T-Berry $8,000 in cash in return for the heroin, and she later met with Agent Valerie Stephenson to give her the package of heroin [R.15:60-3, 70-7; R.8:186-7, R.18:200-03; R.20:101].

On January 10, 1986, Tammy Dennis telephoned My Children's Place and spoke to Richard Joseph and T-Berry, the conversation of which was recorded. Later that same month, Dennis again made a recorded call to My Children's Place and spoke to Joseph. References were made by Dennis to "thirty cents," "the ends," and "brown shoes."

Once Tammy Dennis had concluded her testimony, the trial judge learned, after conducting a defense requested *in camera* examination of her grand jury testimony, that she had not only lied at the grand jury, but had also lied during her testimony in this case. During her cross examination by defense counsel, Dennis testified that she had no involvement in her husband's drug enterprise, or any drug enterprise [R.16:34-6; R.17:11-13]. She also testified that confidential informant Paul Pollock (who, in fact, was a former law enforcement officer) did a drug deal in her apartment with co-defendant Tara Garrison in 1984, but she never knew or heard about Paul Pollock's involvement in another drug deal in Jacksonville, in the Middle District of Florida [R.15:128-9; R.17:14-16, 25-6]. Also during her cross examination Dennis testified that she was given immunity before she appeared at the grand jury, but that she had not done anything wrong to initiate the grant of immunity, and also stated that she never invoked her Fifth Amendment privilege [R.16:34-6; R.17:11-13].

Throughout her cross examination, defense counsel continually demanded that Dennis' grand jury testimony be provided to them, and finally requested that the United States Attorney submit to the court for an *in camera* inspection the grand jury transcripts of Dennis' testimony [R.17:70]. It was only at this time that the court, and subsequently defense counsel, learned that Dennis had lied during her cross examination in this case and had also lied before the grand jury. Specifically, when Dennis first appeared before the grand jury, she lied about Paul Pollock when she said that she never saw him involved in any drug transaction. After her first appearance before the grand jury, she informed her attorney that she had lied, and she asked if she could return to the grand jury to correct her "error." When she went back before the grand jury for the second time, she stated that Paul Pollock was involved in a drug deal, and that she herself was involved in packaging narcotics [R.16:35; R.17:12-26]. This was, however, contrary to her testimony during this trial, since she had testified that she was unaware that Paul Pollock had been involved in a drug bust in Jacksonville, and she had also testified that she had no involvement in her husband's, or any, drug enterprise [R.15:128-9; R.16:34-6].

The trial court held an *ex parte* meeting with the government in chambers after reviewing the grand jury transcripts and learning of the perjury. Even after the court discussed these inconsistencies and obvious lies with the prosecutors, the prosecutors still did not want to turn over these grand jury transcripts to the defense:

THE COURT: Are you aware your confidential informant admitted to perjury in these transcripts?

MR. MULVIHILL: As I understand it, Your Honor—

THE COURT: There is no way to put it any other way. They call it an inaccuracy, but she perjured herself in the first transcript. She lied about Paul Pollock on the narcotics deal, about $20,000. She perjured herself. Why isn't that Brady material, and why hasn't this been produced?

MR. MULVIHILL: Your Honor, I think, first of all, what she said in front of the grand jury initially when she was brought in, she did not see the transactions. She never testified in this courtroom she saw Tara Garrison. And the second time she was brought before the grand jury, she testified she never testified that she saw any narcotics.

THE COURT: They asked her was she aware of any transactions involving narcotics, and she said, "no," six times over. And then, the second time, she said, "Yes, I was aware the $20,000 passed hands, and I knew what was going on. I was in another room. I didn't actually see it. I knew what was happening, and it involved Paul Pollock and $20,000 in cash." And you don't think that is perjury?

MR. MULVIHILL: No, Your Honor, I don't.

THE COURT: Mister, you and I have a misconception of what perjury is, then.

* * *

THE COURT: You don't think when you know that the woman has perjured herself in front of a grand jury, that is probative of Brady material, under any circumstances, especially when it involves the other confidential informant, Pollock?

* * *

The bottom line is, the woman lied in her grand jury testimony. She admits it. The government says it. It involves her and Pollock. She lied to protect Pollock. She is on the stand today, and you are telling me you don't think it was probative of Brady material, the fact that she lied before a United States grand jury?

MR. MULVIHILL: I don't necessarily think—are we talking about the marijuana?

THE COURT: We are talking about perjury and the credibility of a witness under Brady.

MR. MULVIHILL: As far as the cocaine transaction aspect, I don't think she necessarily lied in front of the grand jury. That is where we differ.

[R.18:3-7.]

The court ordered that all grand jury transcripts be made available for defense counsel, and that Dennis be brought back to court for cross examination [R.18:3-7; R.20:7-9].

Before Dennis was recalled to the witness stand, however, the court permitted the government to allow her to study the transcript so that she could prepare herself to explain her perjury. Defense counsel objected and argued that it was not fair that Dennis be permitted to prepare her explanations with the government's help before defense counsel was allowed to cross examine her. The court overruled this objection and permitted Dennis to study the transcripts. Then the court ruled, over defense counsel's repeated objections, that it would permit the government a second direct examination of Dennis [R.20:9-10, 13-16, 102-09].

In their second direct examination of Dennis, the government softened the blows of her perjury by eliciting testimony from Dennis that she had lied because she was scared and under pressure. The government was even able to refer to the prior cross examination by defense counsel and undermine it [R.20:112-11]. Not only did the government have this opportunity to use the transcript in such a fashion to explain away this witness' prior perjury during this trial and at the grand jury, but the jury was never made aware of the fact that the government, itself, exascerbated Dennis' lies by failing to disclose this information to the defense.

Stephen Jackson, a convicted armed robber and heroin dealer, decided to become a cooperating witness for the government in connection with this case since he knew he was facing approximately 200 years in prison when he was arrested [R.24:106-08; R.25:4-22, 53-60, 146-7]. Jackson first met Agent Cutcliff in March 1986, and actually believed that Cutcliff was a good connection for drugs [R.24:170-4]. Jackson was involved in several heroin deals with Cutcliff [R.24:174-80; R.25:18, 92-3; R.25:18, 92-3, 178, 211-13].

The Petitioner was charged in 20 counts of a 33-count indictment, with various violations of federal drug laws, including engaging in a continuing criminal enterprise and occupying the position of organizer, supervisor, or manager [R.1:1]. The jury found the Petitioner guilty on all counts [R.35:14-15, 19-21]. The Petitioner was sentenced to a total term of imprisonment of 150 years, 40 years of which was a minimum mandatory sentence without parole, 12 years of special parole, and fined $250,000 [R.38:36-38].

REASONS FOR GRANTING THE PETITION

I.

THE DECISION OF THE COURT BELOW, WHICH DETERMINED THAT THE GOVERNMENT DID NOT COMMIT A DISCOVERY VIOLATION BY FAILING TO TIMELY PROVIDE DEFENSE COUNSEL WITH CRITICAL IMPEACHMENT MATERIAL INVOLVING A KEY GOVERNMENT WITNESS, AND FURTHER DETERMINED THAT THE TRIAL COURT DID NOT ERR BY PERMITTING THE GOVERNMENT TO DISCLOSE THIS CRITICAL IMPEACHMENT MATERIAL TO DEFENSE COUNSEL AFTER THIS WITNESS HAD COMPLETED HER TESTIMONY AND THEN PERMITTING THE WITNESS TO THOROUGHLY REVIEW THE MATERIAL AND PERMIT THE GOVERNMENT TO ELICIT TESTIMONY IN A REHABILITATIVE FASHION DURING A SECOND DIRECT EXAMINATION OF THE WITNESS, IS IN DIRECT CONFLICT WITH DECISIONS OF THIS COURT, AND WITH DECISIONS OF OTHER CIRCUIT COURTS, REFLECTING A PARTICULAR NEED FOR A UNIFORM STANDARD AND APPLICATION OF LAW

In *Brady v. Maryland*, 373 U.S. 83 (1963), this Honorable Court set forth the criteria that must be met by a criminal defendant to prove that there has been a violation of due process resulting from the prosecution's withholding of favorable evidence. For a

criminal defendant to support his claim that a *Brady* violation has occurred, he must establish that: 1) the prosecutor suppressed evidence; 2) the evidence was favorable or exculpatory to the defendant; and 3) the evidence suppressed was material. *Moore v. Illinois*, 408 U.S. 786, 794-5 (1972); *Ogle v. Estelle*, 641 F.2d 1122, 1124 (5th Cir. 1981). The *Brady* rule requires disclosure of evidence favorable to the defendant both on the issue of guilt and for the purpose of impeachment of an adverse witness. *See United States v. Phillips*, 664 F.2d 971 (5th Cir. Unit B), *cert. denied sub nom, Meinster v. United States*, 457 U.S. 1136 (1981), since impeachment evidence is evidence which is favorable to an accused. *See Giglio v. United States*, 405 U.S. 150 (1972); *United States v. Bagley*, 473 U.S. 667 (1985). Impeachment evidence is clearly evidence favorable to an accused, since "the jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend." *Napue v. Illinois*, 360 U.S. 264 at 269 (1959). The failure of a prosecutor to produce evidence which is materially favorable to the accused's defense, such as the issue regarding the reliability of a witness, the prosecutor's non-disclosure of this is ground for a new trial. *Moore v. Kemp*, 809 F.2d 702 (11th Cir.), *cert. denied*, ____ U.S. ____, 107 S.Ct. 2192 (1987).

Further, cross examination of witnesses in matters pertinent to their credibility should be given the largest possible scope, since it is the cornerstone of the criminal trial process, and is the essential safeguard of fact finding accuracy in order to assure the defendant a fair

trial and his Sixth Amendment right of confrontation. *Mattox v. United States*, 156 U.S. 237, 242-3 (1985); *Douglas v. Alabama*, 380 U.S. 415, 418 (1965); *United States v. Lindstrom*, 698 F.2d 1154 (11th Cir. 1983).

In this case, it is clear the government violated its discovery obligations by failing to provide to defense counsel, in a timely manner, key witness Tammy Dennis' grand jury transcripts, which proved that she had committed perjury at the grand jury and had committed perjury during the trial. Even after the court was made aware of the perjury and the discovery violation, the government still initially refused to provide to the defense the transcripts, thus forcing the trial court to order their disclosure. The appellate court refused to recognize that the disclosure of this critical impeachment material came so late in the trial, and came after Dennis had testified, that the defense no longer could gain the benefit of the use of the information, and it could not be effectively used. The information regarding this key witness' perjury would have provided valuable impeachment material, and would have clearly affected the credibility of this key witness in the eyes of the jury. However, the material could no longer have the effect it would have had if it had been timely disclosed and, if the trial judge did not permit the government to essentially rehabilitate the witness in a second direct examination prior to impeachment.

The Eleventh Circuit Court of Appeals distinguished this case from a "typical" *Brady* claim case, which involves the discovery of the information *after* the trial has concluded. *United States v. Knight*, 867 F.2d at 1289,

citing *United States v. Kubiak*, 704 F.2d 1545, 1549 (11th Cir. 1983) (quoting *United States v. Agurs*, 427 U.S. 97, 103 (1976)). By its decision in this case, the Eleventh Circuit Court of Appeals has narrowed the application of this Court's decision in *Brady v. Maryland* in such a way as to undermine and frustrate the intent of this Court.

In this case, it was most important that defense counsel have an opportunity to fully and effectively cross examine the government's key witness, Tammy Dennis. Dennis was intimately involved with most aspects of the controlled buys which led to this prosecution, and was the only witness against the Petitioner, Richard Joseph. The government had obviously suppressed evidence of Dennis' perjurious grand jury transcripts, and also suppressed the fact that they *knew* that she had committed perjury when testifying during the trial. However, since the perjury was not made clear to the jury, a *Brady* violation occurred, and the defendants were denied their Sixth Amendment right to a full and effective cross examination of the witness. What the Eleventh Circuit Court of Appeals failed to recognize was that although this was not a "typical" *Brady* claim, since it involved the discovery during the trial of critical impeachment material that was previously unknown to the defense, the procedure employed still *did not permit defense counsel to put the impeachment material to effective use.* At the time of disclosure in this case, Dennis had already completed her direct and cross examination. However, the trial court then permitted the witness to prepare answers to questions regarding her perjury by reviewing the transcripts, and then permitted the government an opportunity to

rehabilitate the witness before being impeached by permitting the government to conduct a second direct examination. This is what deprived the Petitioner his right to full and effective cross examination.

The dictates set forth by this Court in *Brady v. Maryland* have been stretched to the point where an insurmountable burden has been placed upon a criminal defendant. The time of disclosure has now become a critical factor in analyzing a *Brady* claim in the Eleventh Circuit Court of Appeals, and this Honorable Court must set an appropriate standard for defining the constitutional requirement of "full and effective cross examination." In this case, the impact of the witness' lies was not the same as it would have been if the witness was not permitted to prepare answers to questions that would be proposed to her by the government again on a second direct examination. Thus, the impeachment material was not put to effective use. The government's conducting a second direct examination was purely for the purpose of "softening the blows" of the witness' perjury, and in fact, when the government was finally forced by the trial judge to disclose the witness' prior lies, they were actually able to use their own misconduct to their advantage by conducting a second direct examination of their witness, and frustrating defense counsel's attempt to really impeach the witness. The Eleventh Circuit Court of Appeals has clearly overlooked the impropriety of the situation were, as here, in a "non-typical" *Brady* case, impeachment material has been provided during the trial, yet was not put to effective use. The Sixth Amendment guarantees to a criminal defendant the right to effective cross examination and the decision of

the Eleventh Circuit Court of Appeals has created a conflict, not only with the decisions of this Court, but with other decisions of the Eleventh Circuit, by overlooking the significance of the Petitioner's right to effective cross examination. *United States v. Owens*, ____ U.S. ____, 108 S.Ct. 838 at 842 (1988), *quoting Kentucky v. Stincer*, ____ U.S. ____, 107 S.Ct. 2658, 2664 (1987) ("The Confrontation Clause guarantees only 'an opportunity for effective cross examination, not cross examination that is effect in whatever way, and to whatever extent, the defense might wish.' ")

By examining the full details of this case, it is clear that the Petitioner did not have the opportunity for effective cross examination, and it was not simply the case that he sought cross examination that was effective "in whatever way, and to whatever extent [he] wish[ed]." *Stincer, supra.* The cross examination in this case did not have the same impact it would have had if 1) the impeachment material was provided after witness Dennis' first direct examination, 2) the jury was made aware of the fact that the government had violated its discovery obligations by not disclosing the impeachment material, despite their knowledge of its existence, 3) the jury had known that the government also committed a fraud on the court by not disclosing this matter to the court, and also by not disclosing the fact that they knew Dennis had lied during her testimony at the trial, 4) the jury had known that even after the government was "discovered," they still persisted in their desire not to disclose *Brady* material, 5) the trial court hadn't permitted the witness to specifically review the perjurious transcripts, with knowledge that she was being called back to testify

specifically to explain away her perjury, and also permitted the government to discuss strategy for explaining away her perjury, both at the grand jury and during the trial, and 6) the government was not then permitted to conduct a second direct examination, enabling them to propose direct questions to the witness to "soften the blows" of the perjury and make it appear to the jury that it was the government that was actually bringing the perjury to the attention of the court.

The seriousness of the discovery violation exhibited in this case cannot simply be brushed off as an attempt by the Petitioner to effectively cross examine a key witness in whatever way and to whatever extent he wished. There has been an obvious corrosion by the Eleventh Circuit.

II.

THE DECISION OF THE COURT BELOW, WHICH DETERMINED THAT THE GOVERNMENT'S CONDUCT WAS NOT IMPROPER DESPITE THEIR FAILING TO CORRECT THEIR KEY WITNESS' PERJURIOUS TESTIMONY, IS IN DIRECT CONFLICT WITH DECISIONS OF THIS COURT, AND WITH DECISIONS OF OTHER CIRCUIT COURTS, REFLECTING A PARTICULAR NEED FOR A UNIFORM STANDARD AND APPLICATION OF LAW

The misconduct exhibited by the government in this case necessitated the granting of a new trial. The government prosecutor permitted their key witness to

perjure herself during the trial and did not, at any time, bring that to the attention of the court or to the attention of defense counsel. The court and defense counsel did not become aware of the witness' perjury until after she had concluded testifying, and the court reviewed her grand jury transcripts *in camera*. The trial judge learned at that point that the witness had committed perjury at the prior grand jury and also during the trial. The prosecutor possessed the transcripts of the witness' grand jury testimony and had every opportunity to correct her false statements, but instead chose to conceal the fact that the witness had lied, in hopes that the fact would not be discovered. There was no doubt that the jury's estimate of the truthfulness and reliability of witness Tammy Dennis was the key issue determinative of guilt or innocence of the Petitioner, since it was Dennis herself who "made the case" against the Petitioner.

The government prosecutor clearly had an obligation and duty to correct witness Dennis' false statements and elicit the truth, and this precedent has been established by this Honorable Court, and has been, in the past, followed by the Eleventh Circuit Court of Appeals. *See Napue v. Illinois*, 360 U.S. 264, 270 (1959); *United States v. Cole*, 755 F.2d 748, 763 (11th Cir. 1985). This type of prosecutorial misconduct is ground for reversal where the "estimate of the truthfulness and reliability of the given witness may well be determinative of guilt or innocence." *United States v. Cole, supra* at 763. The Court of Appeals in fact agreed that the actions by the prosecutor in failing to correct the witness' false testimony was improper. However, the court further found that "since Dennis was called back

and her false statement exposed before the jury" that the prosecutor's failure to correct her false testimony did not warrant a new trial. *United States v. Knight*, 867 F.2d at 1290. A close reading of the trial transcript, however, reveals that the prosecutor never corrected Dennis' false statement, and never elicited the truth from her. The jury never knew of the prosecutor's misconduct and did not know that it was the prosecutor who withheld the information and also withheld other critical impeachment material from defense counsel. In fact, not only did the prosecutor not correct witness Dennis' false statement or elicit the truth from her when she was brought back for a second direct examination, but actually perpetrated a fraud on the court by disguising the truth and actually directing the witness explain away her prior perjury. The prosecutor framed his questions to the witness in a way that permitted her to explain away the perjury and not draw attention to the fact that they had permitted their key witness to lie. *See* R.20:105-20.

The appellate court cites to a recent case in the same circuit, *United States v. Rivera Pedin*, 861 F.2d 1522 (11th Cir. 1988), but as a decision in conflict with this case. In *Rivera Pedin*, the appellant's conviction was reversed due to the prosecutor's failure to correct a witness' false testimony during the trial. The appellate court here now ignores the fact that the prosecutor's actions in this case in failing to correct witness Dennis' false testimony were the same as in *Rivera Pedin*. In this case, the prosecutor's inaction had an effect on the outcome of the trial. Although in this case, defense counsel had an opportunity to conduct a second cross examination of the witness and ask her questions about

her prior perjury during the trial, not only had the fact of her prior perjury lost all effect by that time, but the prosecutor's misconduct was overlooked, the prosecutor was not penalized for his misconduct, and the prosecutor avoided any penalty because of the procedure employed by the trial judge in permitting a second direct and second cross examination to be conducted. Further, when the prosecutor did have the opportunity to correct his witness' false statements when permitted by the trial judge to conduct a second direct examination, the prosecutor completely ignored his obligation to do so and, in fact, conducted a second direct examination aimed at covering up the witness' perjury. The only thing that distinguished this case from the Eleventh Circuit Court of Appeals' decision in *Rivera Pedin* was that our case involved much more than non-disclosure and prosecutorial misconduct in the prosecutor's failing to correct the witness' false statements and eliciting the truth from her, but actually involved prosecutorial subornation of perjury. Again, a clear conflict exists with a decision of this Court, necessitating a particular need for uniform application of law.

CONCLUSION

For the reasons stated, the Petitioner prays that this Court issue a writ of certiorari.

Respectfully submitted,

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Appendix

UNITED STATES of America,

Plaintiff-Appellee,

v.

Michael Lee KNIGHT, Michael Hampton, Tara Garrison, Henry Jeff Ragin, Richard Joseph, Jarrious Washington,

Defendants-Appellants.

No. 87-5031.

United States Court of Appeals,
Eleventh Circuit.

March 15, 1989.

Six defendants were convicted in the United States District Court for the Southern District of Florida, No. 86-322-CR, Thomas E. Scott, J., of various narcotics offenses, including conducting continuing criminal enterprise, conspiracy to possess with intent to distribute heroin and cocaine and possession with intent to distribute and distribution of heroin, and they appealed. The Court of Appeals, Edmondson, Circuit Judge, held that: (1) postarrest statements made by defendant after she had tentatively entered into plea agreement with DEA agent were not inadmissible as statements made in course of plea discussions, and (2) defendants failed to show that Government's disclosure during trial of witness' grand jury testimony, which revealed that witness had lied to grand jury, came so late that it could not be effectively used.

Affirmed.

1. **Criminal Law —407**

Suppressing evidence of plea negotiations serves policy of insuring free dialogue only when accused and Government actually engage in plea negotiations, namely, discussions in advance of time for pleading with view to agreement whereby defendant will enter plea in hope of receiving certain charge or sentence concessions. Fed.Rules Cr.Proc.Rule 11(e)(6), 18 U.S.C.A.

2. **Criminal Law —407**

Once plea agreement is formed, policy behind rule prohibiting admission of statements made by defendant during plea negotiations, which permits defendant to freely negotiate without fear that statements will be used against him, is no longer applicable. Fed.Rules Cr.Proc.Rule 11(e)(6), 18 U.S.C.A.

3. **Criminal Law —407**

Assuming that discussion between defendant and DEA agent who stated that he was acting with express authority of assistant United States Attorney to offer defendant plea agreement was within rule prohibiting admissibility of statements made in course of plea discussions, defendant's postarrest statements, which were made after defendant had agreed with agent to plead guilty to one narcotics count in exchange for truthful cooperation, were not made in course of plea discussions, and thus were not inadmissible, notwithstanding that plea agreement was never entered

into based on agent's belief that defendant had provided untruthful information. Fed.Rules Cr.Proc.Rule 11(e)(6), 18 U.S.C.A.

4. Criminal Law —407

Defendant's postarrest statements made pursuant to plea bargain were not involuntary; defendant had repeatedly been advised of her constitutional rights and executed document acknowledging understanding of those rights and her desire to waive them, defendant, who was in last trimester of pregnancy, was treated with utmost care and every reasonable attempt was made to insure her comfort and well being, and Government's promise of dismissal of certain charges in exchange for defendant's cooperation was bargained-for term of agreement, not overbearing or improper inducement.

5. Criminal Law —700(2)

Brady evidence is "material" if there is reasonable probability that had evidence been disclosed to defense, result of proceeding would have been different.

6. Criminal Law —627.9(5)

In narcotics prosecution, defendants failed to demonstrate that Government's disclosure during trial of witness' grand jury testimony, which revealed that witness had lied to grand jury, came so late that it could not be effectively used; after grand jury testimony was made available to defendants, defense counsel were given opportunity to decide when they wanted witness recalled, had ample opportunity to prepare for witness,

and conducted aggressive cross-examination of witness challenging her credibility and stressing her lack of truthfulness.

7. Criminal Law —919(1)

In narcotics prosecution, prosecutor's failure to correct witness' false testimony to the effect that she had not invoked Fifth Amendment protection during prior grand jury proceeding did not warrant new trial, as during cross-examination defense counsel impeached witness using her grand jury testimony which revealed that she had indeed invoked Fifth Amendment protection at earlier grand jury proceeding. U.S.C.A. Const.Amend. 5.

Michael H. Tarkoff, Flynn and Tarkoff, Miami, Fla., for Garrison.

Linda L. Carroll, P.A., Miami, Fla., for Hampton.

Harris Sperber, Sperber & Goldberg, P.A., Miami, Fla. for Ragin.

Roy E. Black, Black and Furci, Miami, Fla., for Joseph.

Dexter W. Lehtinen, U.S. Atty., Miami, Fla., Eileen M. O'Connor, Sonia Escobio O'Donnell, Linda Collins Hertz, Asst. U.S. Attys., Ft. Lauderdale, Fla., for U.S.

Lee Weissenborn, Michael Lee Knight, Miami, Fla., for Washington.

Michael J. Doddo, Ft. Lauderdale, Fla., for Knight.

Appeal from the United States District Court for the Southern District of Florida.

Before TJOFLAT and EDMONDSON, Circuit Judges, and GIBSON*, Senior Circuit Judge.

EDMONDSON, Circuit Judge.

Six appellants appeal convictions for various narcotics offenses, including conducting a continuing criminal enterprise (CCE), conspiracy to possess with intent to distribute heroin and cocaine, and possession with intent to distribute and distribution of heroin. We affirm.

The facts surrounding the investigation into Richard Joseph's drug organization are complex, involving more than fifteen people. The evidence presented at trial included videotaped heroin purchases, taped telephone conversations about cocaine and heroin, items seized from a "stash house," and testimony concerning "crack" processing and selling. Because all the facts do not bear on the issues addressed in this opinion, we will limit our discussion to those facts that have to do with the issues examined.

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*Honorable Floyd R. Gibson, Senior U.S. Circuit Judge for the Eighth Circuit, sitting by designation.

Denial of Motion to Suppress

Appellant Tara Garrison was arrested pursuant to an indictment charging her with various heroin violations. She was given her *Miranda* warnings at the time of her arrest and while being transported to the DEA office. Because Garrison was in the last trimester of pregnancy, the officers asked specifically about her health and comfort; and she was held, unhandcuffed, in a lunchroom area. Garrison was told a third time of her Miranda rights at the DEA office, and she signed a written waiver of those rights.

After Garrison signed the waiver, DEA Agent Mark Cutcliffe told her that he had been authorized by the Assistant United States Attorney handling the case to offer her a plea agreement: the Government would allow Garrison to plead guilty to one count, dismissing the other charges, in exchange for Garrison's truthful cooperation and statement. Garrison accepted the offer and began answering Cutcliffe's questions. Based on other information Cutcliffe had, he suspected that Garrison was not answering his questions truthfully. After warning Garrison several times during the interview that he did not think she was being candid, Cutcliffe terminated the interview. The district court denied Garrison's motion to suppress the statements she made to Cutcliffe.

Garrison did not testify at the hearing on her motion to suppress but testified at trial that she was working as a "citizen undercover agent" on the two occasions when the government videotaped her distributing heroin. On cross-examination, the government referred

to Garrison's post-arrest statement to impeach her. Garrison contends that (1) the statements were made during plea negotiations and were therefore inadmissible under Fed.R.Crim.P. 11(e)(6) and (2) her statements were involuntary because they were induced by the government's plea offer.

Federal Rule of Criminal Procedure 11(e)(6) provides, in relevant part, that

> [e]xcept as otherwise provided in this paragraph, evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussion:
>
> * * * * * *
>
> (D) any statement made in the course of plea discussons with an attorney for the government which do not result in a plea of guilty or which result in a plea of guilty later withdrawn.

[1] Assuming that Rule 11(e)(6) extends to statements made to law enforcement agents when they state they are acting with the express authority of the United States Attorney's office, we think that the policies of Rule 11(e)(6) would not be served by applying the rule under the circumstances of this case. This court has noted that suppressing the evidence of plea negotiations serves the policy of insuring a free dialogue "only when the accused and the government actually engage in plea negotiations: 'discussions in advance of the time for pleading *with a view to an agreement* whereby the defendant will enter a plea in the hope of

receiving certain charge or sentence concessions.' " *United States v. Robertson*, 582 F.2d 1356, 1365 (5th Cir. 1978) (emphasis added) (citing ABA Project on Minimum Standards for Criminal Justice of Pleas of Guilty, Introduction at 3 (approved Draft 1968)).

[2, 3] Garrison states in her brief that she accepted the agent's offer allowing her to plead guilty to a one-count indictment. Garrison brief at 9. When Garrison accepted the plea offer, her discussions with Cutcliffe were no longer with a view to an agreement; the negotiations had ended and a plea contract was formed.[1] Once a plea contract is formed, the policy behind Rule 11(e)(6)—to allow a defendant to freely negotiate without fear that statements will be used against him—is no longer applicable. *See United States v. Davis*, 617 F.2d 677, 685 (D.C. Cir.1979) ("Excluding testimony made after—and pursuant to—the agreement would not serve the purpose of encouraging compromise"); *United States v. Stirling*, 571 F.2d 708 (2d Cir.1978) (when defendant voluntarily negotiated plea agreement, voluntarily appeared before grand jury pursuant to agreement and then voluntarily violated agreement, government's introduction of grand jury testimony at trial did not undermine confidence and candor needed for plea negotiations); *see also United States v. Rutkowsi*, 814 F.2d 594, 599 (11th Cir.1987) ("[I]f Congress wished for

[1]Appellant's argument that *United States v. Geders*, 566 F.2d 1227 (5th Cir. 1978), *vacated in part on rehearing*, 585 F.2d 1303 (1978), mandates reversal here is without merit. *Geders* held that plea bargaining had commenced and that the statements defendant made were therefore inadmissible, even for impeachment purposes. *Id.* at 1232 & n. 13. In this case the bargain had been struck and the negotiation process had ended, making Rule 11(e)(6) inapplicable.

Rule 11(e)(6) to sweep more broadly Congress would have so provided."). The point of plea negotiations had passed once Garrison accepted the plea offer. Exclusion of statements made once that point is passed would not serve the policy underlying Rule 11(e)(6), and the rule of exclusion therefore no longer applies.

[4] The Supreme Court has never held that statements that are the product of an otherwise valid plea bargain are involuntary. And we follow *United States v. Davis*, 617 F.2d 677, 686 (D.C.Cir.1979), holding that a statement is not involuntary merely because it was made pursuant to a plea bargain. Courts must examine, on a case-by-case basis, whether the defendant voluntarily entered the plea agreement and whether the statements made pursuant to the agreement were made voluntarily. *Id.* at 685-87.

Here, Garrison was repeatedly advised of her constitutional rights, and she executed a document acknowledging her understanding of those rights and her desire to waive them. She was treated with the utmost care and every reasonable attempt was made to ensure her comfort and well-being.[2] By entering into the agreement freely, Garrison sought dismissal of some of the charges against her. The government's promise of dismissal—a promise permitted and encouraged in the plea-bargaining process—was a bargained-for term of the agreement, not an overbearing or improper

[2]Perhaps the written words of Garrison are the most telling description of the voluntariness of the statement: "I feel okay. I'm nervous and frighten [sic]. I have some college education. I'm rested and not hungry. I've been treated good. I have taken no drugs." R29:200.

inducement. *See id.* at 687. Although Garrison's statements were given in exchange for the government's promise, we cannot say under the circumstances of this case that Agent Cutcliffe's statements were such that they rendered Garrison's statements involuntary. Garrison wanted to make the statement to effectuate the agreement. We therefore hold that Garrison's acceptance of the plea offer and her statements made pursuant to that offer were voluntary and that the district court correctly denied the motion to suppress.[3]

Brady Material Disclosed During Trial

Government witness Tammy Dennis concluded her testimony on Friday, October 24, 1986. Defense counsel had requested that the court examine, *in camera*, the transcripts of Dennis' grand jury testimony given in Jacksonville in May and July 1985 in an unrelated matter. On Monday, October 27, 1986, defense counsel were provided with the transcripts, which made it clear

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[3]Although we find no error in the proceedings below, we note that the limited use of Garrison' statements during Garrison's cross-examination would have rendered any error harmless in light of the overwhelming evidence of guilt: two videotapes of Garrison delivering heroin to undercover detectives, two taped telephone conversations where Garrison quoted the price of heroin, testimony by both the undercover agent and a confidential informant, and the exhibits of the heroin delivered by Garrison. *See Rose v. Clark*, 478 U.S. 570, 106 S.Ct. 3101, 3107, 92 L.Ed.2d 460 (1986) (where reviewing court can find that record developed at trial establishes guilt beyond reasonable doubt, interest in fairness has been satisfied and judgment should be affirmed).

that Dennis had not told the truth before the Jacksonville grand jury.[4]

Dennis was recalled to the stand in this case on October 29, and the government conducted re-direct examination. Appellant Joseph's counsel cross-examined Dennis using the grand jury testimony to uncover inconsistencies in her earlier trial testimony and her false testimony before the grand jury. Joseph's counsel declined the trial judge's offer for more cross-examination after an overnight recess. The following day, counsel for Washington, Knight, Hampton and Ragin declined to recross-examine Dennis. Counsel for Garrison, however, conducted a vigorous cross-examination, and counsel for Joseph and Garrison both questioned Garrison yet again, stressing that Dennis had previously testified falsely.

[5, 6] "To establish a *Brady* violation, appellant must show: (1) the prosecution suppressed evidence; (2) such evidence was favorable to the appellant or exculpatory; and (3) the evidence was material. Evidence is 'material' . . . 'if there is a reasonable probability that had the evidence been disclosed to the defense, the result of the proceeding would have been different.' " *United States v. Stewart*, 820 F.2d 370, 374 (11th Cir.1987). (citations omitted) (quoting *United States v. Bagley*, 473 U.S. 667, 105 S.Ct. 3375, 3383, 87 L.Ed.2d 481 (1985) (plurality)).

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[4]In May 1985 Dennis denied any involvement with drugs or her convicted husband's drug business. In July 1985 she admitted packaging marijuana with one of her husband's drug people and testified about a cocaine transaction.

The typical *Brady* claim involves "the discovery, *after* trial of information which had been known to the prosecution but unknown to the defense.' " *United States v. Kubiak*, 704 F.2d 1545, 1549 (11th Cir. 1983) (quoting *United States v. Agurs*, 427 U.S. 97, 103, 96 S.Ct. 2392, 2397, 49 L.Ed.2d 342 (1976)). Here the *Brady* claim involves mere delay in the transmission of the material to the defense and "not outright omission that remained undiscovered until after trial." *Id.* Appellants received the information during the trial and have failed to demonstrate that the disclosure came so late that it could not be effectively used; and thus they cannot show prejudice. *See United States v. Darwin*, 757 F.2d 1193, 1201 (11th Cir.1985). Defense counsel were given the opportunity to decide when they wanted Dennis brought back, and they had ample opportunity while in possession of the grand jury transcripts to prepare for the witness. The jury heard Dennis' credibility challenged; her lack of truthfulness was stressed in aggressive cross-examination by defense counsel. Even if the disclosure should have come sooner, any possible prejudice was cured during trial.[5]

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[5]Appellants' argument that they were denied effective cross-examination is also without merit. Appellants argue that the trial judge deprived them of effective cross-examination by permitting the witness to read the grand jury transcripts before testifying and by permitting the government to conduct a second direct examination of Dennis before defense counsel had an opportunity to impeach. The judge, appellants say, precluded the defense from surprising the witness and "catching her off guard." The confrontation clause guarantees only " 'an *opportunity* for cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.' " *United States v. Owens*, ___ U.S. ___, 108 S.Ct. 838, 842, 98 L.Ed.2d 951 (1988) (quoting *Kentucky v. Stincer*, 482 U.S. 730, 107 S.Ct. 2658,

[7] We note appellants' claim at oral argument that the prosecutor failed to correct testimony by Dennis that the prosecutor knew was false. The first time Dennis testified at trial, she falsely stated that she had not invoked the fifth amendment protection against self-incrimination at the grand jury proceeding in Jacksonville. The prosecution possessed the transcript of Dennis' grand jury testimony, but failed to correct Dennis' false statement. Defense counsel later impeached Dennis, using her grand jury testimony, which revealed that she had indeed invoked the fifth amendment protection at the earlier grand jury proceeding. We have stated that the prosecutor's failure to correct a witness' false testimony will secure a reversal where, the "estimate of the truthfulness and reliability of the given witness may well be determinative of guilt or innocence." *United States v. Cole*, 755 F.2d 748, 763 (11th Cir.1985). Without deciding whether the truthfulness and reliability of witness Tammy Dennis may have been determinative of guilt or innocence, we hold that the prosecutorial

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(Footnote 5 continued)

2664, 96 L.Ed.2d 631 (1987)). We know of no prohibition forbidding witnesses from reviewing a prior statement before testifying. The court controls the mode of interrogations and the presentation of witnesses; it was within the court's discretion to permit the government to call Dennis for re-direct examination. *See* Fed. R.Evid. 611(a). The court's control over the presentation of evidence is to assure the "ascertainment of the truth" and not to surprise a witness or "catch the witness off guard." *Id.* The remedial measures used by the trial court in this case did not deprive the defendants of effective cross-examination; defendants had the opportunity to bring out Dennis' supposed perjury. A review of the record shows that the impeachment material was indeed effectively used.

error in the case does not warrant a reversal. Defense counsel brought Dennis' false testimony before the jury when she was returned to the trial to testify the second time. We are unconvinced that the false statement made when Dennis first testified could have affected the jury's decision where Dennis was called back and her false statement exposed before the jury. We conclude therefore that the prosecutor's failure to correct Dennis' false testimony initially, while troubling, does not warrant a new trial. *Cf. United States v. Rivera Pedin*, 861 F.2d 1522 (11th Cir. 1988) (granting new trial bcause *had jury known* the truth about false testimony, it may have reached different decision).

None of the claims advanced by appellants warrant reversing their convictions.[6] Accordingly, the appellants' convictions are AFFIRMED.

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[6]We conclude that the other claims raised by appellants are meritless, although we do not discuss them in this opinion.